United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2238

To be argued by
JEFFREY I. GLEKEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2238

UNITED STATES OF AMERICA,
Appellee,

—v.—

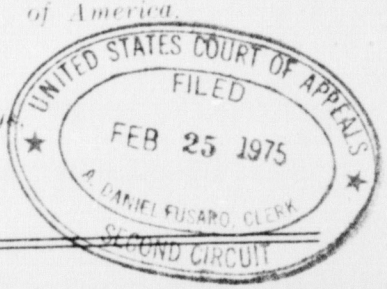
MELVIN KEARNEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEFFREY I. GLEKEL,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
of Counsel.



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Preliminary Statement

Melvin K. Kearney appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 16, 1974, after a three day trial before the Honorable Constance Baker Motley, United States District Court Judge, and a jury.

Indictment 74 Cr. 242, filed March 12, 1974, charged Kearney and Gwendolyn Marie Ferguson * in two counts with armed bank robbery, in violation of Title 18, United States Code, Sections 2113(a) and (d).

* Ferguson was a fugitive at the time of trial.

Trial commenced on September 9, 1974 and ended on September 11 when the jury convicted Kearney on both counts.*

On September 16, 1974, Judge Motley sentenced Kearney to concurrent terms of ten years imprisonment on each count, which were also to run concurrently with a five year term of imprisonment imposed by Judge Motley at the same time following Kearney's earlier conviction of conspiring to rob a different bank, as charged in Indictment 73 Cr. 1039.

Statement of Facts

The Government's Case

At approximately 9:30 a.m. on March 16, 1972, three men, all brandishing guns, burst into a branch of the Bankers Trust Company located at 2104 Crotona Parkway in the Bronx, forced bank employees to lie down, threatened to blow the assistant manager's head off, and a few minutes later left the bank with approximately $178,000 in cash.**

Several bank employees testified to the distinctive roles played by the robbers inside the bank. One robber, wearing a ski mask, held tellers at gun point while an accomplice, who wore glasses, forced bank employees to lead him into the vault area and to open the vault, from which he seized large amounts of money. Meanwhile the third robber, whom the proof established as being Kearney, was observed climbing over the teller's counter, opening a cash drawer, and loading money from the cash drawer into a bag which

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* An earlier trial on the indictment resulted in a mistrial on June 20, 1974, because of the jury's inability to agree upon a verdict.

** Approximately $80,000, dropped by the robbers, was recovered near the entrance of the bank.

he was carrying. This robber wore a floppy hat throughout the robbery. (Tr. 70-114).*

Two fingerprint experts, one employed by the Federal Bureau of Investigation and one in private practice, both testified that they were positive that a latent fingerprint found on a teller's cash drawer and a latent palmprint found on the teller's counter immediately after the commission of robbery were Kearney's. (Tr. 171, 203).

The Government also introduced surveillance photographs which confirmed bank employees' accounts of the appearance and actions of the bank robbers. In addition, a photographic exhibit was introduced by the Government (GX 15), which consisted of a transparency of a photograph of the robber with the floppy hat placed over a known photograph of Kearney for the purposes permitting the jury to compare the features depicted in the two photographs. (Tr. 115-121).

The Defendant's Case

Kearney called a photographer who testified that Government Exhibit 15 was optically misleading because of the lightness of the transparency (Tr. 224-228).

Kearney also introduced a photographic exhibit (DX L) which consisted of a known photograph of Kearney and seventeen photographs of other individuals for the purpose of demonstrating the alleged difficulty of identifying Kearney as the bank robber wearing the floppy hat. (Tr. 220-223).

"Tr." refers to the trial transcript, "GX" to Government exhibits, "DX" to defense exhibits. References to "Tr." preceded by a date refer to the transcript of the pretrial conference held on that date. References to the transcripts of Kearney's first trial on this indictment and to his trial on Indictment 73 Cr. 1039 are identified when they first appear.

ARGUMENT

POINT I

The Government Complied With The Requirements Of The Plan For Achieving Prompt Disposition Of Criminal Cases.

Prior to the first trial of this indictment, Kearney moved to dismiss on the grounds that more than six months had elapsed between the date of his arrest on state charges on September 17, 1973 and his arraignment upon this indictment on April 1, 1974. Kearney had been first charged with this bank robbery in a complaint filed in August, 1972, and later in this indictment, filed in March, 1974.

Judge Bauman, to whom the case was originally assigned, denied the motion on May 17, 1974, following argument, on the grounds that from the date of his arrest by New York authorities Kearney had been in the custody of state authorities either awaiting trial or on trial in connection with the charges on which he had been arrested. (5/17/74 Tr. 16-18). Judge Bauman concluded that since Kearney had been a fugitive between the filing of the complaint charging him with this bank robbery in August, 1972 and his arrest in September, 1973, the six-month period had not yet begun to run as of May 17, 1974, the date of the hearing. He then proceeded to set a trial date of June 17, 1974.*

Prior to the retrial of this indictment, Kearney renewed his motion before Judge Motley, who also denied it. (Tr. 14-33). Judge Motley ruled that the period during which Kearney was in state custody on or awaiting the trial of state charges was excluded by Rule 5(a) of the Southern

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* The case was reassigned to Judge Motley prior to the commencement of the trial.

District Plan for Achieving the Prompt Disposition of Criminal Cases (The Plan) in computing the time within which the Government must be ready for trial. (Tr. 33)

Kearney did not dispute below and does not now challenge the District Court's factual findings. His contention is that despite the fact he was either awaiting trial or on trial in state court from his arrest until June, 1974, the six-month period began running on September 18, 1973, at the time the Government learned that Kearney was in state custody.

This claim is frivolous. Rule 5 of the Plan states:

> "In computing the time within which the Government should be ready for trial under Rules 3 and 4, the following periods should be excluded:
>
> (a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice."

Here it is undisputed that Kearney was in state custody awaiting trial from September, 1973, to May, 1974, and was actually being tried in May and June, 1974. Indeed, it was necessary to delay the trial in this case because Kearney was on trial in the Bronx. (6/6/74 Tr. 2).

In an attempt to evade the plain meaning of Rule 5(a), Kearney invokes Rule 5(f), which requires the Government to make "'diligent" and "reasonable" efforts to obtain the presence of a defendant detained in another jurisdiction. It is clear, however, that Rules 5(f) and 5(a) were intended to cope with very different situations. While Rule 5(f) is clearly intended to deal with the defendant who is serving a sen-

tence in another jurisdiction, *Smith* v. *Hooey,* 393 U.S. 394 (1969), Rule 5(a) is addressed to the situation where judicial proceedings on other outstanding criminal charges are currently pending against the defendant, as they clearly were against Kearney from the date of his arrest until virtually the date of his first trial on this indictment and thereafter. Kearney's contention to the contrary, and his claim that the excluded period under Rule 5(a) is limited to the time when he was actually on trial in the state courts,* are foreclosed by *United States* v. *Cangiano,* 491 F.2d 906, 908-09 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3229 (October 22, 1974). No purpose underlying the Sixth Amendment or the Plan would be served by construing either to require the federal and state court systems to compete with each other for the opportunity to be the first to try a defendant.** Cf. *United States* v. *Canti,* 469 F.2d 114, 119 n. 3 (D.C. Cir. 1972).

POINT II

The Government Was Not Estopped From Retrying Kearney On Indictment 73 Cr. 1039.

Kearney claims that the Government "estopped" itself from proceeding on this indictment by remarks made by an Assistant United States Attorney in connection with the setting of the order for trial of the two indictments naming him. The contention is without merit.

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* Kearney's tortured construction of Rule 5(a) flies in the face of its express language, which refers to "proceedings . . . pending" and lists "trial of other charges" as an example following the words "including but not limited to".

** This is particularly true when a defendant is the subject of numerous pending state charges, as Kearney was. According to Kearney's counsel, Kearney was charged in the Bronx with attempted murder and in Brooklyn with murder, kidnapping, robbery and bail jumping (5/17/74 Tr. 5).

Originally, Indictment 73 Cr. 1039 was assigned to Judge Motley and this Indictment, 74 Cr. 242, was assigned to Judge Bauman.

On May 17, 1974, at a pre-trial conference, Judge Bauman announced that Indictment 74 Cr. 242 would be tried on June 17, 1974. (5/17/74 Tr. 39).

On June 5, 1974, at a pre-trial conference, Judge Motley, unaware of the trial date which Judge Bauman had set, announced that Indictment 73 Cr. 1039 would be tried on June 17, 1974. (6/6/74 Tr. 2). To resolve the conflict, Judge Motley arranged to have both cases assigned to her (6/6/74 Tr. 5). A conference was then held on June 6, 1974 to determine which of the two cases should be tried first. The Government requested that what it considered to be the stronger case, 74 Cr. 242, proceed as scheduled on June 17 (6/6/74 Tr. 3) and represented that if Kearney were convicted on the bank robbery charges in Indictment 74 Cr. 242, the Government did not contemplate pursuing the other indictment. (6/6/74 Tr. 3, 9-10). Judge Motley agreed to try Indictment 74 Cr. 242 first. (6/6/74 Tr. 10, 25-26).

The trial of Indictment 74 Cr. 242 ended on June 20, 1974 in a mistrial, and Judge Motley scheduled Indictment 73 Cr. 1039 for trial on June 24, 1974. When the trial of Indictment 73 Cr. 1039 resulted in a conviction on the conspiracy count only, Kearney argued that the Government was estopped from retrying this indictment. (Tr. I. 544-45).* Judge Motley ruled to the contrary: "What the

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* "Tr. I." refers to the transcript of the trial of Indictment 73 Cr. 1039. This Indictment, filed November 15, 1973, charged in Count One that Kearney conspired with Phyllis Pollard, Joe Lee Jones, Jr., Twymon Myers and Avon White to rob the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, and to use firearms in the course of the robbery. Title 18, United States Code, Section 371. Counts Two, Three and Four charged Kearney, Pollard and Jones with the robbery and theft

[Footnote continued on following page]

[the Government] obviously had in mind, Mr. Berman, is that if he were convicted in this case on the Indictment, not on one count, or if he had been convicted in that other case, on the Indictment, they would have dropped this. That was obviously what they meant." (Tr. I. 546-47). Kearney made the identical motion prior to the commencement of the retrial, which Judge Motley again denied: "We all know the context in which this arises. My ruling is that the Government clearly intended that if he were convicted in that first case, or even in the second one on the Indictment, they wouldn't proceed to try him again for obvious reasons. He would be sentenced as a bank robber and that second Indictment would only result in a concurrent sentence at best." (Tr. 13).

The contention that Kearney's conviction on the conspiracy count of Indictment 73 Cr. 1039 "estopped" the Government from retrying this case is thus foreclosed by the holding of the trial Court that the Government's promise was intended to apply only to a conviction on the entire indictment, including the substantive counts. Judge Motley was in a uniquely appropriate position to construe the meaning of the Assistant United States Attorney's remarks, since they were directed to her and made in open court. Her construction is overwhelmingly supported by the record, logic and practice, and it controls absent a showing of clear error in no way made by Kearney. *United States* v. *Pomares*, 499 F.2d 1220, 1223 (2d Cir. 1974).

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of money from the bank and the use of firearms in the course of the robbery and theft, in violation of Title 18, United States Code, Sections 2113(a), 2113(b), and 2113(d), respectively. Only Kearney proceeded to trial. On June 26, 1974 the jury found Kearney guilty as charged in Count One, and not guilty as charged in Counts Two, Three and Four. Kearney's appeal, Dkt. No. 74-2239, from this conviction was heard on February 14, 1975. At the argument, the Court of Appeals remanded the case to the District Court for a determination of Kearney's new trial motion, which was predicated upon a claim that the Government failed to furnish a Jencks Act statement of Avon White, a witness at that trial. White did not testify at the trial of this case.

Moreover, even if the remarks made by the Assistant United States Attorney were to be treated as a promise with estoppel effect, it would avail Kearney nothing. The "promise" was made on June 6, 1974, and consisted of a statement that if Indictment 74 Cr. 242 was tried first and the defendant was convicted of bank robbery, "the Government expects . . . we will not prosecute the second case." (6/6/74 Tr. 3). Of course, this did not come to pass because Kearney was not convicted of anything at the first trial of the indictment. Thus this condition precedent to the expected dismissal of Indictment 73 Cr. 1039 never occurred, and the promise became a nullity. Kearney seeks to argue for a renewal of this "promise" by constructing in his brief (at 9) an additional promise not to retry this case if Kearney were convicted on Indictment 73 Cr. 1039. This "promise" was in fact never made (Tr. 398 of the first trial of Indictment 74 Cr. 242) and, even if it had been, it would have had no binding effect on anyone, since there is no showing—or even argument made—that the Court or Kearney relied on or were in any way affected by it. Indeed, the scheduling of the cases for trial had been set before this extraneous remark was made. *Cf. United States* v. *Ortega-Alvarez,* 506 F.2d 455, 458 (2d Cir. 1974).

Finally, even if Kearney's illogical interpretation of the prosecutor's remarks is accepted, the Government still would not have been estopped from retrying this indictment. No prejudice was suffered by Kearney nor strategic advantage gained by the Government as a result of the order in which these indictments were tried. Indeed, it was in the interests of all the parties to the proceedings to schedule the trials in an order which would maximize the probability of there being only one trial. *Santobello* v. *New York,* 404 U.S. 257 (1971), upon which Kearney relies, held only that "when a plea of guilty rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. Here, Kearney did not forfeit any rights whatsoever in reliance upon the Government's representation.

POINT III

The Court Properly Denied Kearney's Motion To Suppress Prints Of His Obtained On September 17, 1973 As Fruits Of A Fourth Amendment Violation.

Kearney contends that all fingerprint evidence presented at trial should have been suppressed as fruits of his allegedly illegal fingerprinting on April 17, 1972 by the New York police following his arrest on traffic, grand larceny and weapons charges. These prints were made available to the Federal Bureau of Investigation which compared them to prints taken at the scene of the bank robbery. Kearney's theory below was that the allegedly unconstitutional search of his person incident to his arrest for a traffic violation led to the discovery of a loaded gun which resulted in his being fingerprinted. (6/17/74 Tr. 9-18; Def. Pre-trial Memorandum, 8-10).* These fingerprints, however, were not introduced at trial. It is undisputed that on September 17, 1973, Kearney was fingerprinted by an F.B.I. agent following a subsequent arrest in the Bronx on another unrelated state charge. This was the only set of Kearney's fingerprints introduced at trial. The testimony of the Government's fingerprint experts was based exclusively upon a comparison between Kearney's September, 1973, prints and the latent prints removed from the bank. The District Court ruled prior to the first trial that even assuming the illegality of the April 17, 1972 fingerprinting, Kearney's subsequent arrest and fingerprinting on September 17, 1973 constituted a supervening and independent source. (6/17/74

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* Kearney's claim seems to be that the traffic violations for which he was originally arrested were not "printable" offenses under New York law. It was only the discovery, following a search incident to that arrest, that he had a loaded gun on his person which, according to Kearney, resulted in his arrest on more serious charges for which fingerprinting was mandated by New York law. Kearney did not submit any affidavits in support of his contentions.

Tr. 13-18). The Court reaffirmed its ruling when Kearney renewed his motion prior to the retrial. (Tr. 33).

The contention that the September, 1973, fingerprints were somehow the "fruit" of the allegedly illegal April, 1972, fingerprinting is frivolous. The Supreme Court has rejected the contention "that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun* v. *United States,* 371 U.S. 471, 487-88 (1963). The question is whether "the evidence to which objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* The prints obtained by the agents at the scene of the bank robbery were, of course, not the subject of any Fourth Amendment claim by Kearney, and the fingerprints introduced at trial for identification purposes were taken following an arrest on an entirely different and unrelated charge which occurred some seventeen months after the allegedly illegal fingerprinting of April, 1972. Under these circumstances, any taint which may have arisen from his April, 1972, fingerprinting was entirely dissipated. *Hamrick* v. *Wainwright,* 465 F.2d 940 (5th Cir. 1972); *Bynum* v. *United States,* 274 F.2d 767 (D.C. Cir. 1960).

Moreover, it is clear that the F.B.I. would have been interested in obtaining Kearney's fingerprints following his September, 1973, arrest even if the earlier April, 1972, arrest and fingerprinting had never occurred, in order to compare them with prints removed from the teller's counter and cashier's drawer following the robbery. The suspicions which caused the F.B.I. to make a comparison based upon Kearney's April, 1972, prints would obviously also have caused it to make such a comparison following his September, 1973, arrest. *United States* v. *Falley,* 489 F.2d 33, 40-41 (2d Cir. 1973); *United States* v. *Cole,* 463 F.2d 163, 171-74 (2d Cir.), *cert. denied,* 409 U.S. 942 (1972); *Commonwealth of the Virgin Islands* v. *Gereau,* 502 F.2d 914, 927-28 (3d Cir. 1974).

Finally, although the Court and the Government assumed *arguendo* the illegality of Kearney's 1972 fingerprinting in order to expedite matters, it is clear, accepting the version of the facts presented by Kearney's counsel, that the fingerprinting occurred under circumstances conforming to the requirements of the Fourth Amendment. Kearney's claim below was that the search following his arrest for a traffic offense that resulted in the discovery of the gun and his being fingerprinted was unconstitutional. But the Supreme Court has upheld the constitutionality of searches incident to arrests for traffic violations in *United States* v. *Robinson*, 414 U.S. 218 (1973).

POINT IV

The Court Did Not Erroneously Limit Defense Counsel's Cross-Examination Or Summation With Respect To The Destruction Of Fingerprint Lifts.

William C. Carmen, a fingerprint expert employed by the Federal Bureau of Investigation, testified that eight fingerprint and palmprint lifts were forwarded to him for examination in connection with this bank robbery. (Tr. 172). Two of the lifts, he stated, bore prints belonging to Kearney. Two of the lifts, according to Carmen, bore prints of some unidentified individual or individuals other than Kearney. (Tr. 166). The four remaining lifts, however, were useless for identification purposes. Carmen destroyed these in conformity with the F.B.I.'s normal procedure. (Tr. 172, 151). Kearney's contention that he was precluded by the Court from developing and commenting upon relevant evidence with respect to the four destroyed fingerprint lifts is wrong on two grounds.

First, Kearney's counsel fully developed the fact that Carmen destroyed four fingerprint lifts before the Government's objection to this line of questioning was sustained

by the Court. (Tr. 172-174). Thus the facts concerning the destruction were fully before the jury. Judge Motley acted well within her discretion in curtailing further cross-examination on this topic. *United States* v. *Jenkins,* Dkt. No. 74-2257 (2d Cir., February 10, 1975); *United States* v. *Sperling,* Dkt. No. 73-2367 (2d Cir., October 10, 1974) slip op. at 5647. *United States* v. *Pacelli,* 491 F.2d 1108, 1120 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3208 (Oct. 15, 1974); *United States* v. *Kahn,* 472 F.2d 272, 281 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973). Furthermore, the only restriction placed by the Court upon the defense summation concerned defense counsel's announced intention of analogizing the destruction of the four lifts to the alleged "deep sixing" of "Watergate" evidence by L. Patrick Gray, former Director of the F.B.I. (Tr. 247). Of course, as Judge Motley ruled, such an analogy would have been improper and prejudicial to the Government. Moreover, even if defense counsel interpreted Judge Motley's ruling as barring any reference at all to the destruction of the four lifts, the Court's admonition did not deter him in the least, since during his summation he directly commented upon the destruction of the lifts. (Tr. 264-65, 270).

Secondly, Judge Motley properly exercised her broad discretion in ruling that the fact that the four destroyed lifts might have contained prints of individuals other than Kearney was not relevant to his defense.* *See United States* v. *Gottlieb,* 493 F.2d 987, 991-92 (2d Cir. 1974). The Government never contended that Kearney was the only person in the bank on the day of the robbery. The uncontradicted proof at trial established that there were three robbers and numerous employees in the bank during the bank robbery. Indeed, a fingerprint expert testified that

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* The Government never suggested or even speculated that the defective lifts might have contained Kearney's prints. Its own fingerprint witness testified he had destroyed the lifts because they were of no value for identification purposes. (Tr. 172).

two of the lifts removed from the teller's counter bore prints which were not Kearney's. Even if Kearney could have established that the four lifts destroyed by Carmen did contain the prints of other individuals, this would not tend to exculpate Kearney in the least.

POINT V

The Prosecutor's Summation Was Entirely Proper.

Kearney's contention that the prosecutor's comments on his failure to present evidence which contradicted or furnished an innocent explanation for the conclusion of Government experts that a palmprint and fingerprint found on the teller's counter and cash drawer respectively were his is frivolous. It is well established that "remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony. . . ." *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970); *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3212 (October 15, 1974). Here, the prosecutor's comments were directed at Kearney's failure to call any fingerprint expert to substantiate the defense theory that the print on the cash drawer was not his or to produce any records or testimony in support of the defense claim that Kearney might have had legitimate business in the bank, such as collecting food stamps or cashing a welfare check, on the day the crime was committed. (Tr. 287-89). Obviously such evidence, if it existed,* could and would have been presented through witnesses other than the defendant. The prosecutor's comments did not in any way constitute

* How a person engaged in a legitimate transaction at a bank could get his hand on the cash drawer could not, we submit, have been explained by anyone.

a comment upon Kearney's failure to testify. Moreover, the prosecutor's comments on the uncontradicted nature of the Government's fingerprint evidence were made in response to the attempt of Kearney's counsel in his summation to assume the role of an expert and deliver a discourse on the alleged differences between the fingerprint on the cash drawer and the known fingerprint of Kearney and to speculate, without any evidentiary support whatsoever, as to the business Kearney might have been conducting in the bank on the day in question. (Tr. 255-64). The prosecutor's response was completely appropriate and did not in any way shift the burden of proof.

Finally, it is apparent, as Judge Motley noted in response to Kearney's objection, that the prosecutor's use of the term "fact" (Tr. 289), read in the context it was used, referred only to the evidence or lack of evidence presented and did not refer to the prosecutor's personal knowledge of matters outside the record. See *Lawn* v. *United States,* 355 U.S. 339, 359-60 n. 15 (1958).

POINT VI

The Sentencing Procedure Was Entirely Proper.

Kearney argues that he must be resentenced because in denying him Young Adult Offender treatment and sentencing him to ten years in prison the Court relied on evidence supporting charges of which he had been acquitted in the trial of Indictment 73 Cr. 1039.* This argument is entirely without merit.

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* At the time of the sentencing here, Kearney was also sentenced upon his conviction for conspiring to rob the First National City Bank, 1855 Bruckner Blvd., Bronx, New York, as charged in Count One of Indictment 73 Cr. 1039. In that case Kearney was sentenced to five years imprisonment, to run con-

[Footnote continued on following page]

It was entirely proper for the trial court to rely on the evidence presented at the trial of Indictment 73 Cr. 1039 even though Kearney had been acquitted of the substantive charges in that Indictment. *United States* v. *Sweig,* 454 F.2d 181, 184 (2d Cir. 1972); *United States* v. *Atkins,* 480 F.2d 1223 (9th Cir. 1973). The Court also made a specific finding that appellant would not benefit from treatment as a Young Adult Offender "because the Court's observation of Mr. Kearney is, that he has nothing but contempt for authority including the authority of this Court and that such an attitude on his part is not conducive to rehabilitation." (Tr. 352).

Given the evidence available to the Court upon which Kearney's sentence was based, the Court's statement of the reasons why sentence was imposed, and Kearney's opportunity to review the presentence report and to comment on it, there is no basis for an attack on the propriety of the sentence. *United States* v. *Brown,* 479 F.2d 1170 (2d Cir. 1973); *United States* v. *Needles,* 472 F.2d 652 (2d Cir. 1973); *United States* v. *Sweig, supra.*

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currently with the ten years imprisonment imposed on this indictment.

The Court announced, before imposing sentence simultaneously in both cases:

> "The Court has considered the presentence report and of course this case was tried before the Court, both cases, so the Court is familiar with the evidence adduced at that trial and it's on the basis of that alone which the Court sentences the defendant at this time. That evidence disclosed that this defendant was involved in each case in a major bank robbery which involved not only the use of firearms, but the use of force. A bank manager, I guess it was, was actually struck over the head by one of Mr. Kearney's accomplices in indictment 74 Cr. 242.
>
> In the first indictment the evidence disclosed that Mr. Kearney himself fired a firearm." (Tr. 351-52).

CONCLUSION

The Judgment Of Conviction Should Be Affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEFFREY I. GLEKEL,
JOHN D. GORDAN, III,
Assistant United States Attorneys, of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JEFFREY I. GLEKEL being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24th day of February, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

JESSE BERMAN, Esq
351 Broadway
New York, N.Y. 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeffrey I. Glekel

Sworn to before me this

24th day of February 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
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Certificate filed in New York County
Commission Expires March 30, 1976